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Supreme Court, U.S.
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No. 91-2085

IN THE

Supreme Court of the United States

October Term, 1991

GENEVIEVE L. DUNN,

Petitioner,

vs.

AMY ANNE MARCO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Q.1 Should this Honorable Court accept for review the dismissal of a personal injury action where the action was dismissed in accordance with both state and federal law, where the appeal involves no constitutional question, no conflict with federal or state law, and where it is merely an attempt to re-argue the same issues for a third time?

Q.2 When a personal injury action is dismissed in accordance with both state and federal law because the plaintiff failed to make any effort to notify or serve the defendant with process before the running of the statute of limitations, and named a non-entity as a defendant, is an appeal from the dismissal of that action worthy of this Honorable Court's time and attention?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this action are Genevieve L. Dunn and "Anne F. Marco." Although the petitioner's motion to amend the caption in this case has been denied in the courts below in this action, the petitioner's Brief erroneously names the respondent as Amy Anne Marco rather than "Anne F. Marco." Amy Anne Marco has never been properly brought before this Honorable Court in this action, and it is respectfully submitted that the naming of Amy Anne Marco as the respondent on the cover of the Petition is in error.

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COUNTERSTATEMENT OF JURISDICTION

Contrary to the petitioner's mischaracterization of this case as simply involving a misnomer of the defendant, this action actually involves the complete failure to notify or serve anyone as a defendant in this action prior to the running of the statute of limitations.

It is respectfully submitted that the petitioner misstated the grounds on which the jurisdiction on which this Court is invoked when she stated that the defendant's Rule 12(b) Motion to Dismiss was granted because of the plaintiff's typographical error. To the contrary, the defendant's Rule 12(b) Motion was granted because the plaintiff made no effort to notify or serve the defendant or intended defendant prior to the running of the statute of limitations in this action, in addition to the fact that the plaintiff named a non-entity as a defendant, through no fault on the part of the defendant.

While the petitioner relies upon 28 U.S.C. §1254(1) and claims diversity of citizenship, the District Court held that the plaintiff never properly brought the defendant before the Court. That decision was affirmed by the United States Court of Appeals for the Third Circuit. Consequently, it is respectfully submitted that there is no diversity of citizenship because no defendant was ever properly brought before this Honorable Court. There is no person known as "Anne F. Marco."

COUNTERSTATEMENT OF STATUTES INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances, and/or regulations involved in this personal injury action. This action merely involves an issue of service of process that arose because the plaintiff never notified or served the defendant or intended defendant prior to the running of the statute of limitations, as well as an issue of naming a non-entity as a defendant.

COUNTERSTATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred on May 8, 1988. The Plaintiff/Petitioner has been represented by counsel since June 10, 1988. Suit was not filed until May 3, 1990 (2a).[1] The parties to this action have agreed that the statute of limitations ran on plaintiff's claims on May 8, 1990. **No effort was ever made to serve or notify anyone of this lawsuit before the running of the statute of limitations.**

Before the statute of limitations ran, plaintiff and/or her counsel obtained a police report prepared in connection with the investigation of the accident involved in this action (70-71a). That police report identified the drivers of the motor vehicles involved in the accident as "Amy Anne Marco, R.D. #2, Box 209, Derry, PA 15627" and "Franklin E. Chidester, 532 Fifth Street, Apartment B, Marietta, OH 45290." (A. 7).[2] Amy Anne Marco continued to reside at the address shown on the police report until her marriage on June 3, 1989 (86a). Her married name is Amy Anne Prechtl (86a). When she left the address set forth in the police report, she left a forwarding address with the Derry, Pennsylvania Post Office (87a).[3] No effort was made by plaintiff or her counsel to serve Amy Marco, "Anne F. Marco," or anyone else until after the statute of limitations ran on May 8, 1990 (70a-72a). In fact, Amy Marco Prechtl has not been served with the Complaint in this action to date, nor has she ever been served with any process in this action (87a).

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[1] References (_____a) are to the Appendix in the Third Circuit.

[2] References (A. _____) are to the Appendix appended to this Brief.

[3] The applicable Pennsylvania statute is set forth at 42 Pa. C.S.A. Section 5524(2) and is a 2-year statute.

When the Complaint was filed, it was filed against "Anne F. Marco." Amy Marco does not go by the name of "Anne." (153a). The first purported attempt at service of process in this action was the mailing by certified mail to "Anne F. Marco" and to "Ms. Anne Marco," R.D. #2, (Box 209), Derry, PA 16527 on May 14, 1990 and on May 24, 1990. The first envelope was returned with the notation, "Unknown, R.D. #2," and the second envelope was returned with the notation, "Unknown at this address." (284-285a).

At the time of the accident allegedly involved in this action, Amy Anne Marco was operating a motor vehicle owned by her father, William F. Marco, and that vehicle was insured by Federal Kemper Insurance Company. Federal Kemper first received a courtesy copy of the Complaint on May 15, 1990 and after the statute of limitations ran, by way of a cover letter from plaintiff's counsel dated May 10, 1990, after the statute of limitations ran (200a).

The deposition of Belva Marco, Amy Marco's mother, was taken on December 4, 1990. Belva Marco first learned of the lawsuit involved in this action after the statute of limitations ran in approximately July of 1990 (139-140a).

The deposition of William Marco, Amy's father was taken on December 4, 1990. He testified that he never saw the two certified mail envelopes dated May 14 and 24, 1990 prior to the date of his deposition on December 4, 1990 (116a). He had no contact with the insurance company (Federal Kemper) after his wife told him about Amy's accident (116-117a). His wife contacted the insurance company and the insurance company never told him that they anticipated suit (117a).

William Marco and his wife thought that this matter was "over long ago." (118-119a). Amy's parents just turned the information over to their insurance agent and never heard anything from him or the insurance company (119a). William Marco admitted in his deposition that an investigator named Douglas Cahill came to his home on approximately September 1, 1990 (121a). Mr. Marco told Mr. Cahill that he was Amy's father and Mr. Cahill handed him papers which Mr. Marco handed back to Mr. Cahill. Mr. Cahill asked Mr. Marco for Amy's address and Mr. Marco told him that she was living in Pittsburgh and married (41a, 121-122a). He did not tell Mr. Cahill Amy's exact address because Mr. Cahill got "smart" with him (122a).

Amy Marco Prechtl's deposition testimony was also taken on December 4, 1990. She testified that she never considered that the plaintiff would file a claim against her, and that she first learned of a claim being filed in this action toward the end of July, 1990, after the running of the statute of limitations (151-152a). She confirmed that when she moved from her parent's home in Derry, Pennsylvania on or about June 10, 1990, she left a forwarding address with the Derry, Pennsylvania post office and that she goes by the name of "Amy." (151-153a).

Amy's parents did not tell her about the certified mail envelopes referred to above (154a). She first learned of them on the date of her December 4, 1990 deposition in this action (154a). She never received any letter from her insurance company concerning this lawsuit, and she had no phone conversations with anyone from Federal Kemper other than a recorded statement that she gave to Federal Kemper approximately a week after the May 8, 1990 accident involved in this action (151-152a, and 166a).

Amy Prechtl testified in her December 4, 1990 deposition that she was married on June 3, 1989 and that her then current address was 169 Churchill Road, Turtle Creek, Pennsylvania 15145. **She has never been served with any process in this case at any time** (86-87a).

Jeff Dimond, the insurance adjuster handling the matter for Federal Kemper, was also deposed on December 4, 1990. Jeff Dimond testified that he received a courtesy copy of the plaintiff's Complaint on May 15, 1990 after the statute of limitations ran. He did not contact the insured by phone, but he mailed a letter to "Anne F. Marco" on May 22, 1990 (200-201a). That letter was returned "accepted, not known" and it was at that time that Federal Kemper realized that the "wrong person" had been sued (201a). Before that letter was returned, Federal Kemper had already assigned the handling of the matter to the law firm of Cipriani & Werner with instructions to answer the Complaint and to enter an Appearance on behalf of the defendant, "Anne F. Marco." (200a).

After it was discovered that the "wrong defendant" had been named, Federal Kemper instructed Cipriani & Werner of Amy Marco's name by letter dated June 19, 1990 (203-204a). Nothing in Federal Kemper's file indicated that any service was made on Federal Kemper's insured (204a).

The Federal Kemper file documented only three (3) occasions on which the adjuster, Jeff Dimond spoke with plaintiff's counsel, David Knauer, Esquire (199a). Jeff worked under the assumption that it was his insured that had been sued until the Claims Manager, Tanya Wheeler, noticed the difference between the name of the defendant in the Complaint and the insured's name (207-208a). In fact, Jeff was not sure if he even looked at the Complaint (209a).

Tanya Wheeler, the Claims Manager for Federal Kemper, was also deposed on December 4, 1990. She testified that although Federal Kemper had settled the property damage claim arising out of the May 8, 1990 accident, the release involved with that settlement stated "it's a disputed and doubtful claim." (229-232a).

Meanwhile, before Jeff Dimond or Federal Kemper learned that the plaintiff had not sued the insured, the law firm of Cipriani & Werner entered its Appearance on behalf of "Anne F. Marco" and requested a reasonable extension of time to file a responsive pleading (88-89a).

On July 27, 1990 a Rule 12(b) Motion was filed on behalf of the defendant, which requested the District Court to dismiss the plaintiff's Complaint on the grounds of insufficiency of process, lack of process, lack of jurisdiction over the person of the defendant, the running of the statute of limitations, failure to state a claim upon which relief can be granted, naming a non-entity as a defendant and/or lack of due diligence in attempting service of process (A. 1 & 2).

At the April 26, 1991 hearing in this matter before the District Court, Douglas J. Cahill testified that he was hired by plaintiff's counsel as an investigator. On October 10, 1990, he obtained the address of Amy Anne Marco from the Derry, Pennsylvania Post Office. He also testified that he did not make any attempt to serve Amy Marco with process at that address and that he knew of nobody who attempted to do so (44a).

Attorney Knauer also testified at the April 26, 1991 hearing. He testified that no attempt had been made to serve "Anne F. Marco" or Amy Anne Marco between the date of filing the Complaint in this action (May 3, 1990), and the date of the running of the statute of limitations (May 8, 1990) (71-72a).

The explanation offered by Attorney Knauer at both his December 4, 1990 deposition (130-131a), and at the April 26, 1991 hearing for the filing of suit against "Anne F. Marco" was a claimed typographical error caused by a misreading of the police report, either by himself or by his secretary (64a).

A purported Amended Complaint was filed by the plaintiff on or about August 26, 1990 and the certified copy of the docket entries in this action also contains an entry of September 5, 1990 for the filing of an Amended Complaint (2a).

Amy Marco has never been served with either the original Complaint or the Amended Complaint in this action (87a), and there is no evidence of any effort to serve "Amy Prechtl" at any time.

At the April 26, 1991 hearing, Attorney Knauer represented that Attorney Peter Darragh, formerly of the law firm of Cipriani & Werner, agreed to accept service of the Amended Complaint if the Rule 12(b) Motion was denied (75a). In fact, the agreement by Attorney Darragh with Mr. Knauer is set forth in the September 13, 1990 letter by Attorney Darragh to Attorney Knauer (95a).

That agreement expressly provided that Mr. Darragh agreed to accept service of the Amended Complaint only upon Mr. Knauer's agreement that "this acceptance will not constitute a waiver, or in any way prejudice, the defendant's argument as set forth in the Rule 12(b) Motion which is before the Court and any defense to your Petition for Extension of Time to Serve the Complaint. If the Court rules that the plaintiff cannot establish good cause for an extension of time upon which to serve the Amended Complaint, then our agreement to accept service will be nullified." (95a).

The depositions referenced above were offered and admitted into evidence at the April 26, 1992 hearing held by Magistrate Judge Benson (22a, 76-77a). Magistrate Judge Benson also permitted the filing of affidavits and they were submitted in support of respondent's supplemental brief in support of the Motion to Dismiss in the District Court below.

The Honorable Magistrate Judge Benson found in his Recommendation that Amy Anne Marco had neither actual nor constructive notice of the filing of the Complaint within the statute of limitations in this action, and held that the plaintiff's purported Amended Complaint would not relate back to the date of filing of the original Complaint pursuant to Federal Rule of Civil Procedure 15(c) (Petition App. 66). He also found that under either Federal or Pennsylvania law, the plaintiff would not be permitted to bring a party before the Court for the first time after the statute of limitations had run, particularly where the intended party defendant had no knowledge or notice of the lawsuit prior to the running of the statute of limitations and where there was no misconduct or attempt to conceal on the part of the intended defendant (Petition App. 66 & 72-73).

Magistrate Judge Benson's Report and Recommendation were reviewed by the Honorable Judge Alan M. Block of the United States District Court for the Western District of Pennsylvania. On the basis of Judge Block's *de novo* review of the pleadings and documents, together with the Report and Recommendation of Magistrate Kenneth J. Benson, Judge Block entered a Memorandum Order dated June 27, 1991 granting the defendant's Rule 12(b) Motion to Dismiss (Petition App. 51-53). The judgment of the District Court was affirmed by the United States Court of Appeals for the Third Circuit (Petition App. 49-50). A Petition for Rehearing was denied by the Court on February 26, 1992 (Petition App. 47-48).

Although the Petitioner states on Page 20 in the Petition for Writ of Certiorari that "the defendant has never contended that the misnomer in any way prejudiced Marco in her defense," counsel for the respondent did argue prejudice due to the delay in receiving notice of the lawsuit involved in this action. That argument was set forth on pages 21 and 22 of the Respondent's Brief for the Appellee in the United States Court of Appeals for the Third Circuit (A. 3-5).

SUMMARY OF ARGUMENT

There is no constitutional issue involved in this case nor any issue involving a treaty, ordinance or other matter that makes the dismissal of this personal injury action worthy of the time and attention of this Honorable Court.

The granting of this defendant's Rule 12(b) Motion to Dismiss was in accordance with both state and federal law because the plaintiff and her counsel made no effort to notify or serve anyone prior to the running of the statute of limitations in this action, in addition to the unilateral mistake of naming a non-entity as a defendant. The Petitioner in this case is now attempting to reargue this case for the third time, and it does not warrant this Honorable Court's time and attention.

REASONS FOR DENYING THE WRIT

A. The issues involved in this appeal do not merit the time and attention of this Honorable Court.

In short, this is a run-of-the mill personal injury case in which there was a total failure to even attempt to make service of process or to notify the intended defendant prior to the running of the statute of limitations. The result reached below was in accordance with state and federal law and the issues involved do not merit this Honorable Court's time and attention. This appeal also does not involve any constitutional issue or federal statute. The filing of the Petition is merely an attempt to reargue the same issues for a third time and that attempt is frivolous and would be a waste of judicial resources. For each and all of those reasons, this Honorable Court should deny Certiorari in this action.

B. Dismissal of this action was proper and in accordance with state and federal law.

This is not a case of a mere misnomer of a party. It is a case of lack of service of process and lack of notice, coupled with naming a non-entity as a defendant. The granting of the defendant's Rule 12(b) Motion was in accordance with both state and federal law. There is no conflict of case law involved in this action and the cases of *Beyda v. U.S. Air, Inc.*, 697 F.Supp. 1394 (W.D. PA) and *Dandrea v. Malsbary Mfg. Co.*, 839 F.2d 163 (3rd Cir. 1988) are clearly distinguishable. This Honorable Court has never obtained jurisdiction over the person of any defendant in this action.

Federal law and Pennsylvania law are to the same effect:

> Jurisdiction over the person of a defendant is dependent upon proper service of process having been made. *Sharp v. Valley Forge Medical Center and Heart Hospital*, 422 Pa. 124, 221 A.2d 185 at 187 (1966); *U.S. v. Klein*, 230 F. Supp. 426, 440 (W.D. Pa. 1964), aff'd, 356 F.2d 983-984 (1966); *Hemmerich Industries, Inc. v. Moss & Brown Company, Inc.*, 114 F.R.D. 31 at 32 (E.D. Pa. 1987).

According to those authorities, no jurisdiction over the person of a defendant can be obtained without service of process on the defendant. In the instant case, there has never been any service of process on either Amy Anne Marco or on the non-existent "Anne F. Marco." The District Court, accordingly, never obtained *in personam* jurisdiction over "Anne F. Marco" and/or Amy Marco, and the plaintiff has not cited a single case or authority to the contrary. Rather, the plaintiff has confused the simple legal question involved in this action by continually mischaracterizing this case as one of a mere misnomer of the defendant, and all of the authorities cited by the petitioner are inapposite.

The granting of the Motion to Dismiss based on lack of notice and service prior to the running of the statute of limitations was totally in accord with both state and federal law. The seminal case in Pennsylvania that dealt with an attempted amendment after the running of the statute of limitations is *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976). The Pennsylvania Supreme Court in *Lamp* stated the following test to determine the effect of service or process which is delayed beyond the running of the statute of limitations:

> "In actions instituted subsequent to the date of this decision, a Writ of Summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion." *Id.*, at 889.

Note that "stalling the legal machinery in its tracks" does not require bad faith on the part of a plaintiff or even an overt attempt to delay, nor does it require prejudice caused by the delay. *Watts v. Owens-Corning Fiberglas Corp.*, 353 Pa. Super. 267, 509 A.2d 1268 (1986). Simple neglect is an example of failing to fulfill the duty of plaintiff or the duty of her counsel to see that the requirements of service are carried out. *Weiss v. Equibank*, 313 Pa. Super. 446, 460 A.2d 271 (1983).

In the instant case, it is beyond cavil that the legal machinery was stalled by the mistake of plaintiff's counsel and/or his secretary in naming a non-entity as a defendant and by the absence of any attempt to serve the Complaint or to notify the defendant of the lawsuit prior to the running of the statute of limitations. Plaintiff's counsel had this case from at least the date of his June 10, 1988 letter to Federal Kemper Insurance Company. Plaintiff's counsel had a minimum of one (1) year and eleven (11) months to file the Complaint against the proper party defendant and to timely commence or attempt service of process. That was not done. In fact, Amy Anne Marco's address was always available to plaintiff's counsel either through the police report or by way of her forwarding address that she left at the Derry, Pennsylvania post office.

For each and all of the foregoing reasons, it is clear that under Pennsylvania law the plaintiff has failed to meet the requirements of the test set forth in *Lamp v. Heyman*, and its progeny, and that this defendant's Rule 12(b) Motion to Dismiss was properly granted. The Amended Complaint, being an amendment of a nullity should also have been dismissed as being null and void.

Regardless of the lack of service of process issue in this action, the District Court correctly concluded that the amendment sought by the petitioner would not have been allowed under Pennsylvania law as stated by the Pennsylvania Supreme Court in the case of *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965). In *Saracina*, the plaintiff was not permitted to amend the Complaint to name Anthony Cotoia, rather than his son, Robert Cotoia, because it would have added a new and distinct party to the action. In the instant case, just like in *Saracina*, the effect of the desired amendment would be to bring a new party into the lawsuit for the first time. Again, no one has been properly brought before the Court in this action, and to do so under the guise of an amendment would be to ignore the requirements of service of process and due process of law.

The same conclusions are reached under federal law. District Magistrate Judge Benson, in his Memorandum Opinion of September 25, 1990, correctly set forth the test for "relation back" under Rule 15(c) as set forth in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379 at 2384 (1986):

> "(1) The basic claim must have arisen out of the conduct set forth in the original pleading;
>
> "(2) The party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
>
> "(3) That party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
>
> "(4) The second and third requirements must have been fulfilled within the prescribed limitations period." 477 U.S. 21a and 29.

The petitioner in this case failed to meet at least the second, third and fourth requirements for relation back of the purported Amended Complaint. Nothing was done to apprise anyone, including Amy Anne Marco and/or "Anne F. Marco," of anything connected with lawsuit prior to the running of the prescribed limitation period. In fact, service of process was not even attempted until after the running of that period. There was virtually no evidence presented from which it might be concluded that Amy Anne Marco knew or should have known of the filing or commencement of this action prior to the running of the statute of limitations, and that is true regardless of the claimed mistake in naming a non-entity as a defendant.

Arguably, the petitioner did not even meet the first requirement under Rule 15(c), because she named a non-entity as a defendant. Please note that under Pennsylvania law, responsibility for suit against the proper party defendant rests on the plaintiff; the defendant is under no duty to inform the plaintiff whom he or she should sue. *Taylor v. Humble Oil and Refining Co.*, 225 Pa. Super. 177, 311 A.2d 324 at 325 (1973); *McCrery v. Scioli*, 336 Pa. Super. 455, 485 A.2d 1170 at 1175 (1984), citing *Taylor*.

Although the petitioner argues in her Brief that the defendant never contended that the "misnomer" in any way prejudiced Marco in her defense, such an argument was made by the respondent at pages 21 and 22 of the respondent's "Brief of Appellee" in the Court below. As stated in that Brief, although counsel for plaintiff attempted to establish that Federal Kemper's investigation was completed shortly after the May 8, 1988 accident involved in this action, that does not mean that "Anne F. Marco" and/or Amy Anne Marco have not

been prejudiced by the delay in receiving notice of this lawsuit. To the contrary, it would be absurd to suggest that there was no prejudice. No attempt at service was made until after the running of the statute of limitations, and consequently, Amy Anne Marco and/or Anne F. Marco were deprived of the opportunity to engage legal counsel and/or to file a protective Complaint or Writ of Summons in order to assert any sole liability or comparative fault on the part of the plaintiff's driver, Franklin Chidester. Amy Anne Marco and/or "Anne F. Marco" also lost the opportunity for her or their lawyers to perform their own investigation, including but not limited to an investigation into the nature and extent of the plaintiff's injuries. They were also deprived of the subpoena power of the Court to aid in the investigation of the accident and claimed injuries.

District Magistrate Judge Benson correctly held that under Pennsylvania law, relation back of an Amended Complaint is not permitted where a new party is thereby added. *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1985). The Petitioner contends that Magistrate Benson was wrong in his application of *Saracina* and cites the cases of *Thomas v. Duquesne Light Company*, 376 Pa. Super. 1, 545 A.2d 289 (1988); *Paulish v. Bakaitis*, 442 Pa. 434, 275 A.2d 318 (1971); and *Powell v. Sutliff*, 410 Pa. 436, 189 A.2d 864 (1963). Those cases are not on point. Each of those cases dealt with the failure to properly name a business partnership or corporation where some owner or officer in his official capacity had been properly served. In this case, no one has ever been served.

The petitioner also relies upon the cases of *Beyda v. U.S. Air, Inc.*, 697 F. Supp. 1394 (W.D. PA 1988) and *Dandrea v. Malsbary Mfg. Co.*, 839 F.2d 163 (3rd Cir. 1988). As the Petitioner knows, both of those cases are clearly distinguishable. The plaintiff in *Beyda* did serve the defendant with the Complaint, and that case only dealt with correcting a misnomer of someone already before the Court. Likewise, in *Dandrea* the amendment was allowed because there was a real entity that was sued under its former name, and there was an attempt in that case to effect service of process or to notify the defendant by sending a copy of the Summons and Complaint by regular mail to former counsel for the defendant several days before the running of the statute of limitations. Service of process in *Dandrea* was ultimately accepted by signing the Notice and Acknowledgment of Receipt of the Summons and Complaint. In short, service or process was made in *Dandrea* on a real corporation which had merely changed its name. In the instant case, there was no attempt to serve or notify the defendant or anyone else prior to the running of the statute of limitations, and no party has ever been served in their former or present name. Accordingly, there is no conflict between the granting of the Motion to Dismiss in this case and the results reached in *Beyda* and *Dandrea*.

The respondent also notes the following errors or inaccuracies in the Petition for Writ of Certiorari in this action:

1. The respondent is incorrectly named as "Amy Anne Marco." The amendment of the respondent's name is precisely the relief which was not granted the Petitioner in this action, and the Petitioner should not be permitted to make that change.

2. The statement on Page 20 of the Petition that "the defendant's 12(b) Motion was solely on the technical basis of the typographical error except for other matters not involved in this appeal" is a totally inaccurate mischaracterization of this defendant's Motion. That motion was based upon the grounds of insufficiency of process, lack of process, lack of jurisdiction of the person of the defendant, the running of the statute of limitations, the failure to state a claim upon which relief can be granted, as well as naming a non-entity as a defendant and/or lack of due diligence in attempting service or process (A. 1 & 2). To characterize those grounds as a "typographical error" is inaccurate.

3. Contrary to the assertion on page 6 of the Petition for Writ of Certiorari that the defendant or her counsel admitted "no prejudice" and contrary to the assertion on page 20 that the defendant "has never contended that the misnomer in any way prejudiced the plaintiff in her defense, the respondent argued prejudice in its Brief for Appellee in the Court below, at Pages 21 and 22 (A3-5).

CONCLUSION

The Petition for a Writ of Certiorari should be denied in all respects.

Dated: July 17, 1992

Respectfully submitted,

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APPENDIX

Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Insufficiency of Process, Insufficiency of Service of Process, or Lack of Jurisdiction Over the Person, and Statute of Limitations

4424

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 90 0753

GENEVIEVE L. DUNN,

Plaintiff,

vs.

ANNE F. MARCO,

Defendant.

The defendant moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the original summons and/or Complaint names a non-entity as a defendant and not an actual individual.

3. To dismiss the action because the original summons and/or Complaint were never served upon petitioner prior to the expiration of the Statute of Limitations.

4. To dismiss the action because the plaintiff did not exercise due diligence in attempting to serve the original summons and/or Complaint on defendant prior to the expiration of the Statute of Limitations.

5. To dismiss the action on the basis the Court lacks in personam jurisdiction over the defendant.

6. To dismiss the action on the basis that plaintiff is barred from amending the caption naming Amy Anne Marco as the proper defendant due to the fact the Statute of Limitations has expired against Amy Anne Marco.

7. To dismiss the action on the basis that plaintiff is barred from amending the caption naming Amy Anne Marco as defendant on the basis plaintiff failed to diligently ascertain the proper defendant for the subject lawsuit.

Respectfully submitted,

BY: PETER K. DARRAGH, ESQUIRE
BY: PETER K. DARRAGH, ESQUIRE

Excerpts of Brief for Appellee in United States Court of Appeals for the Third Circuit

[21]

* * *

(3) That party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and

(4) The second and third requirements must have been fulfilled within the prescribed limitations period."

In this case, the Appellant failed to meet at least the second, third and fourth requirements for "relation back" of the Amended Complaint.

Nothing was done to apprise anyone, including Amy Anne Marco and/or "Anne F. Marco" of anything connected with this lawsuit prior to the running of the prescribed limitations period. In fact, service of process was not even attempted until after the running of that period. There was virtually no evidence presented that Amy Anne Marco knew or should have known of the filing or commencement of this action prior to the running of the limitations period, regardless of the claimed mistake in naming the Defendant.

Arguably, Appellant has not even met the first requirement under Rule 15(c) because of her failure to name the proper party. In that regard, please note that under Pennsylvania law, responsibility for suit against the proper party Defendant rests on the Plaintiff, and the Defendant is under no duty to inform the plaintiff whom he or she should sue. *Taylor v. Humble Oil and Refining Co.*, 225 Pa.Super. 177, 311 A.2d 324 at 325 (1973); *McCrery v. Scioli*, 336 Pa.Super. 455, 485 A.2d 1170 at 1175 (1984) citing *Taylor*.

Although counsel for the Plaintiff attempted to establish that Federal Kemper's investigation was complete shortly after the May 8, 1988 accident involved in this action, that in no way establishes that "Anne F. Marco" and/or Amy Anne Marco have not been prejudiced by the delay in receiving notice of [22] this lawsuit. To the contrary, it would be absurd to suggest that there was no prejudice.

Obviously, because no attempt at service was made until after the running of the statute of limitations, Amy Anne Marco and/or "Anne F. Marco" were totally deprived of the opportunity to engage legal counsel and/or to file a protective Writ of Summons in order to assert any sole liability or comparative fault on the part of the Plaintiff's driver, Franklin Chidester. Amy Anne Marco and/or "Anne F. Marco" also lost the opportunity for her or their lawyers to perform their own investigations, including but not limited to an investigation into the nature and extent of the Plaintiff's injuries, and they were deprived of the subpoena power of the Court to aid in the investigation of the accident and claimed injuries.

Additionally, District Magistrate Judge Benson correctly held that under Pennsylvania law, the rule regarding relation back of amended complaints where a new indicated party is added is not permitted. *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965). Appellant contends the Magistrate is wrong in his application of *Saracina* and cites *Thomas v. Duquesne Light Company*, 376 Pa.Super. 1, 545 A.2d 289 (1988); *Paulish v. Bakaitis*, 442 Pa. 434, 275 A.2d 318 (1971), (W.DPa. 1984); *Powell v. Sutliff*, 410 Pa. 436, 189 A.2d 864 (1963). However, a close scrutiny of those cases reveals that they are not on point with the facts in this case.

Each of those cases dealt with the failure to include the proper name, not of an individual, but of a business, partnership or corporation where some owner or officer in his official capacity had been properly served. In this case, no one has ever been served.

* * *

PA. DEPT. OF TRANSPORTATION
CENTER FOR HIGHWAY SAFETY
202 T & S BUILDING
HARRISBURG, PA 17120

D002459-02

COMMONWEALTH OF PENNSYLVANIA
POLICE ACCIDENT REPORT

☒ REPORTABLE ☐ NON REPORTABLE ☐ HAZARDOUS MATERIALS

N/A

1 INCIDENT NUMBER	2 AGENCY NAME	3 STATION/PRECINCT
A3-536693	PENNA STATE POLICE	INDIANA 1130

4 INVESTIGATING OFFICER	BADGE NO	5 DATE/TIME REPORT	6 APPROVED BY	7 DATE APPROVED
TPR JEFFREY S. KRAWZYK	5200	05/10/88	JA	05/09/88

8 DATE	9 DAY	10 TIME	11 COUNTY	12 CODE	13 PATROL ZONE NO
05/08/88	SUN	2000	INDIANA	32	29
14 NO VEH	15 NO KILLED	16 NO INJURED	17 MUNICIPALITY	18 CODE	
2	0	3	CENTER TWP.	206	

UNIT NO 1

19 OPERATOR LICENSE NO	CLASS	20 STATE	21 SEX	22 DOB	23 LEGALLY PARKED	24 ILLEGALLY PARKED	25 HIT & RUN
21869897	7	PA	F	12/05/68	YES ☐ NO ☒	YES ☐ NO ☒	YES ☐ NO ☒

26 NAME: AMY ANNE MARCO — ADDRESS: RD2 BOX 209, DERRY PA 15627
27 OWNER NAME: WILLIAM F. MARCO — ADDRESS: SAME AS OPER #1

28 VEHICLE TITLE NO	29 YEAR	30 MAKE	31 MODEL (NOT BODY TYPE)	32 VEHICLE REGISTRATION NO	33 STATE
3T850379901	79	FORD	THUNDERBIRD	58138B	PA

34 INSURANCE COMPANY NAME	37 TOWED TO	38 TRAILER MAKE, MODEL, TYPE
FEDERAL KEMPER INS. CO.	DRIVEN FROM SCENE	

35 INS CO CODE	36 INS POLICY NUMBER	39 TOWED BY	40 TRAILER REGISTRATION NO	STATE
2251	K0386761	OPER #1		

41 OWNER OF TRAILER — ADDRESS

UNIT NO 2

19 OPERATOR LICENSE NO	CLASS	20 STATE	21 SEX	22 DOB	23 LEGALLY PARKED	24 ILLEGALLY PARKED	25 HIT & RUN
PH632597	2	OH	M	12/27/50	YES ☐ NO ☒	YES ☐ NO ☒	YES ☐ NO ☒

26 NAME: FRANKLIN E. CHIDESTER — ADDRESS: 532 5TH ST APT B MARIETTA OH 45750
27 OWNER NAME: U.S. FLEET LEASING INC. — ADDRESS: 2 WATERPARK DR. SO. SAN MATEO CA. 94403

28 VEHICLE TITLE NO	29 YEAR	30 MAKE	31 MODEL (NOT BODY TYPE)	32 VEHICLE REGISTRATION NO	33 STATE
2026C77901	86	CHEV	CAVALIER	NVA527	PA

34 INSURANCE COMPANY NAME	37 TOWED TO	38 TRAILER MAKE, MODEL, TYPE
THE HOME INDEMNITY CO.	MUNDICKS TOWING	

35 INS CO CODE	36 INS POLICY NUMBER	39 TOWED BY	40 TRAILER REGISTRATION NO	STATE
4068	BA4037459	WRECKER OF SAME		

41 OWNER OF TRAILER — ADDRESS

42 DESCRIPTION OF DAMAGED PROPERTY: NONE — OWNER

PRINCIPAL ROAD			INTERSECTING ROAD	
43 ROUTE NO OR STREET NAME: SR 0119	44 SPEED LIMIT: 55	45 DIRECTION OF TRAVEL: N S E W	46 ROUTE NO OR STREET NAME	47 SPEED LIMIT

IF NOT AT INTERSECTION	48 NEAREST CROSS ROUTE OR STATION MILEPOST NO	49 DIRECTION FROM POINT SITE: N E W	50 DISTANCE FROM POINT SITE: 100 ft	51 WAS DISTANCE: ☒ MEASURED ☐ ESTIMATED
	SR 3035			

52 ILLUMINATION: 1	53 WEATHER: 0	54 ROAD SURFACE: 1	55 TRAFFIC CONTROL DEVICE TYPE
1 - DAWN OR DUSK 2 - DAYLIGHT 3 - DARK (ST LIGHTS ON) 4 - DARK (NO ST LIGHTS)	0 - NO ADVERSE COND 1 - RAINING 2 - SLEET, HAIL, ETC 3 - SNOWING 4 - FOG, SMOKE, ETC 5 - RAINING AND FOGGY	1 - DRY 2 - WET 3 - MUDDY 4 - SNOW OR ICE 5 - ROAD PLOWED 6 - ROAD CINDERED/SALTED	PRIN ROAD: 0 INT ROAD: 1 0 - NO CONTROLS 1 - FLASHING TRAFFIC SIGNAL 2 - TRAFFIC SIGNAL 3 - STOP SIGN 4 - YIELD SIGN 5 - RR CROSSING CONTROLS 6 - POLICE OFFICER OR FLAGMAN 7 - FLASHING SCHOOL ZONE SIGN 8 - OTHER

56 WITNESS NAME: DONE KNOWN — ADDRESS
WITNESS NAME — ADDRESS

57 INJURED TAKEN TO: INDIANA HOSPITAL - FRED SCHILLING INDIANA PA.-

58. USE CODES ON OVERLAY SHEET TO COMPLETE BLOCKS A THRU N OF THIS SECTION

A	B	C	D	E	F	G	NAME — ADDRESS	H	I	J	K	L	M	N
1	D	F	B	3	1	0	OPER #1	N	0	-	-	B	0	0
2	1	M	37	B	1	0	OPER #2	N	4	09	03	B	0	0
2	B	F	B6	B	1	0	GENEVIEVE LYNN SA...	-	4	09	03	B	0	0
2	5	F	22	2	2	0	LISA SANDY - ...	-	4	09	04	B	0	0

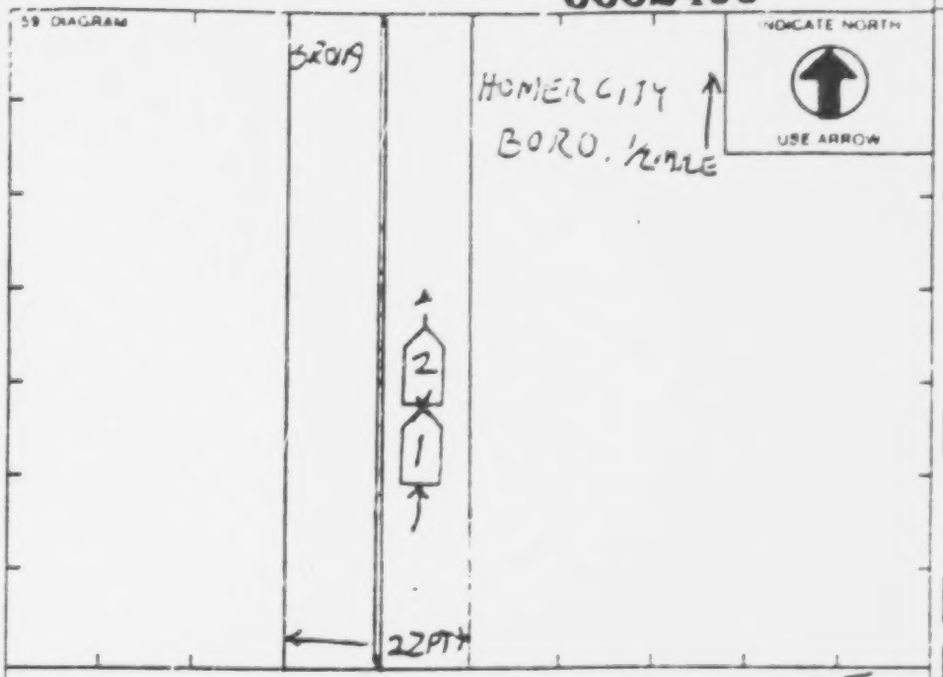
CENTER FOR HIGHWAY SAFETY

BEST AVAILABLE COPY

0002460

INCIDENT NUMBER: F3-536693

59 DIAGRAM



Number of Lanes on Principle Road 2 LANE MARKED - ARRIVED - 2035

60 NARRATIVE

THIS ACCIDENT ALLEGEDLY OCCURRED IN VEH'S 1 & 2 WERE TRAVELING NORTH ON SR 219, VEH #1 FOLLOWING VEH #2. VEH #2 STOPPED ON THE ROADWAY FOR A VEH WAITING TO TURN LEFT & INITIAL IMPACT OCCURRED AT THE FRONT END OF VEH #1 STRUCK THE REAR END OF VEH #2 NEAR THE CENTER OF THE NORTH BOUND LANE OF SR 219. FOLLOWING IMPACT BOTH VEHS TRAVELED A SHORT DISTANCE NORTHERLY & CAME TO REST FACING NORTH ON THE ROADWAY. VEH #1 WAS MOVED PRIOR TO THIS OFFICER'S ARRIVAL. NO PHYSICAL EVIDENCE OBSERVED. THE ROADWAY WAS SWEPT PRIOR TO THIS OFFICER'S ARRIVAL.

OPER #1 STATED, "I WAS STOPPED 2 CARS BEHIND A CAR WAITING TO TURN LEFT. THE CAR PULLED FORWARD A LITTLE & STOPPED & SO DID I, THEN WE GOT HIT." OPER #2 STATED, "THE CAR WAS STOPPED, THEN HE STARTED MOVING & STOPPED FAST, & I COULDN'T GET STOPPED."

OPER #1 NO SUS., NO RES., ISSUED TICKETS

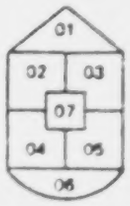
OPER #2 NO SUS., NO RES., ISSUED TICKETS

VEHICLE NUMBER: 1 | 2

61 AUTO/TRUCK BODY TYPE — 1: 03 | 2: 05

01 CONVERTIBLE
02 2 DR HARDTOP
03 4 DR HARDTOP
04 2 DR SEDAN
05 4 DR SEDAN
06 STA. WAGON
07 LIMOUSINE
08 OTHER AUTO
11 4 WHEEL DRIVE VEHICLE
12 PICK-UP
13 VAN (NOT MOVING VAN OR HORSE VAN)
14 TOW TRUCK
15 OTHER "SINGLE UNIT" TRUCK
16 TRACTOR (CAB ONLY)
17 TRACTOR TRAILER
18 OTHER TRUCK BODY
31 MOTORCYCLE

62 INITIAL POINT OF IMPACT — 1: 01 | 2: 06



00 NONE
07 TOP
08 UNDERCARRIAGE
09 TOWED UNIT
99 UNKNOWN

63 VEHICLE DAMAGE SEVERITY — 1: 1 | 2: 2

1 NONE
2 MODERATE
3 SEVERE
4 LIGHT

64 WAS TOWING REQUIRED BECAUSE OF DAMAGE? — 1: 0 | 2: 1

0 NO
1 YES

65 ESTIMATED TRAVEL SPEED — 1: 20 | 2: 00

0 NONE (STOPPED PARKED)
01-97 CODE ACTUAL SPEED
98 98 OR GREATER
99 UNKNOWN

66 VEHICLE GRADIENT — 1: 1 | 2: 1

1 LEVEL ROADWAY
2 UPHILL
3 DOWN HILL

67 SPECIAL USAGE (MOTOR VEHICLES ONLY) — 1: 00 | 2: 00

00 NONE
01 PUPIL TRANSPORT
02 FIRE VEHICLE
03 AMBULANCE
04 OTHER EMERGENCY VEHICLE
05 STATE POLICE VEHICLE
06 DOT VEHICLE (PA)
07 OTHER STATE GOVT VEHICLE
08 MUNICIPAL POLICE VEHICLE
09 OTHER MUNICIPAL GOVT VEHICLE
10 FEDERAL GOVT VEHICLE
11 TAXI
12 TOWING CAR
13 TOWING TRUCK
14 TOWING UTILITY TRAILER
15 TOWING MOBILE MODULAR HOME
16 TOWING CAMPER
17 TWIN TRAILER 5 AXLES
18 TWIN TRAILER 6 OR MORE AXLES

68 HAZARDOUS MATERIAL TYPE FROM PLACARD OR SHIPPING DOCUMENT — 1: CODE 00 | 2: CODE 00

00 NOT APPLICABLE
01 NON FLAMMABLE GAS
02 COMBUSTIBLE
03 ORGANIC PEROXIDE
04 POISONOUS
05 EXPLOSIVE A
06 OXYGEN
07 POISON
08 EXPLOSIVE B
09 CHLORINE
10 RADIOACTIVE
12 FUEL OIL
13 DANGEROUS
14 RADIOACTIVE
15 FLAMMABLE SOLID W
16 FLAMMABLE
17 FLAMMABLE GAS
18 FLAMMABLE SOLID
19 GASOLINE
20 BLASTING AGENTS
99 OTHER

OR

PLACARD NUMBER

69 VIOLATIONS INDICATED UNIT NO. 1: FOLLOWING TOO CLOSELY

70 VIOLATIONS INDICATED UNIT NO. 1: OCCUPANT RESTRAINT

71 DRIVER LICENSE NUMBER / STATE: 33 [illegible] (9)

72 DRIVER LICENSE NUMBER / STATE: NONE

73 VEHICLE IDENTIFICATION NUMBER: 021251

74 VEHICLE LICENSE NUMBER / STATE: NONE

FOR ALCOHOL TEST TYPES BLOCKS 78 AND 79 USE THE FOLLOWING CODES: 1 BLOOD 2 BREATH 3 URINE 4 OTHER

75 NAME | 76 TYPE | 77 RESULT | 78 NAME | 79 TYPE | 80 RESULT

81 IS THE INVESTIGATION COMPLETE? YES

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